

The Honorable Richard A. Jones

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

395 LAMPE, LLC, a Nevada limited
liability company,

Plaintiff/
Counterclaim Defendant

v.

KAWISH, LLC, a Washington limited
liability company; and TIMOTHY L.
BLIXSETH and JANE DOE BLIXSETH,
husband and wife,

Defendants/
Counterclaim Plaintiff's/
Third-Party Plaintiffs,

v.

WAYNE L. PRIM, an individual residing
in Nevada; THE BLACKSTONE
CORPORATION, a Washington
corporation; PRIM 1988 REVOCABLE
TRUST, a private trust; and OVERLOOK
PARTNERS, LLC, a Washington limited
liability company,

Third-Party Defendants.

Case No. 2:12-cv-01503-RAJ

395 LAMPE'S MOTION FOR
PARTIAL SURRENDER OF
INJUNCTION BOND

**NOTE ON MOTION CALENDAR:
DECEMBER 14, 2012**

WITHOUT ORAL ARGUMENT

MOTION FOR PARTIAL SURRENDER
OF INJUNCTION BOND (2:12-cv-01503-RAJ) -1-

GUNDERSON LAW FIRM

3895 Warren Way
Reno, Nevada 89511
(775) 829-1222

1 Plaintiff 395 LAMPE, LLC, a Nevada limited liability company (“395 Lampe”)
 2 files this Motion for Partial Surrender of the \$25,000 bond (“Injunction Bond”) posted by
 3 Third-Party Defendant OVERLOOK PARTNERS, LLC (“Overlook Partners”) pursuant
 4 to its Motion for Temporary Restraining Order and Preliminary Injunction to Restrain
 5 Foreclosure Sale and the correlated Temporary Restraining Order Restraining Foreclosure
 6 Sale and Setting Hearing (“TRO”). [Dckt 9-2].

7 395 Lampe initially filed this motion in Washington State court out of an
 8 abundance of caution to ensure that 395 Lampe did not waive any rights or claims against
 9 the Injunction Bond. The Washington State court ordered that the Injunction Bond be
 10 transferred to this Court and allowed 395 Lampe to re-file this Motion here.

11 395 Lampe also notes that this action was removed by Kawish, LLC, to this
 12 District Court, instead of Bankruptcy Court, in apparent violation of CR 101(e).
 13 Nonetheless, this matter is currently pending before this Court and therefore this Motion is
 14 filed in this Court. Should this matter be transferred to the Bankruptcy Court, the
 15 Injunction Bond and this Motion should likewise be transferred.

16 I. INTRODUCTION

17 395 Lampe, by and through its counsel of record, respectfully submits this Motion
 18 for Partial Surrender of Injunction Bond. 395 Lampe seeks an order from this Court
 19 surrendering \$13,038.75 from the Injunction Bond to compensate 395 Lampe for the costs
 20 incurred as a result of the improper injunction. All remaining amounts may be released to
 21 Overlook Partners.

22 II. STATEMENT OF FACTS

23 On or about April 4, 2008, Defendant TIMOTHY L. BLIXSETH (“Blixseth”)
 24 executed a Promissory Note in favor of 395 Lampe in the principal amount of ten million
 25 dollars (\$10,000,000.00) (“Blixseth Note”). The Blixseth Note was due and payable on
 26 April 11, 2008. At approximately the same time, Overlook Partners executed a
 27 Promissory Note in favor of Blixseth in the principal amount of fifteen million dollars

1 (\$15,000,000.00) (“Overlook Note”). The Overlook Note was secured by certain real
 2 property located in Montana (“Overlook Lots”) through a written and recorded mortgage
 3 (“Overlook Mortgage”).

4 Blixseth defaulted on the Blixseth Note. In lieu of Blixseth paying the principal
 5 balance and interest owing per the Blixseth Note, Blixseth, 395 Lampe, and Overlook
 6 Partners entered into a Note Agreement effective as of May 5, 2008 (“Note Agreement”).
 7 See Brain 7/30/12 Aff., Ex. 4. [Dckt 8-4].

8 As an element of the satisfaction of the Note Agreement, Blixseth assigned the
 9 Overlook Note and the Overlook Mortgage to 395 Lampe and the principal amount of the
 10 Overlook Note was reduced to ten million dollars (\$10,000,000.00). Id. The Overlook
 11 Note is in default. Accordingly, 395 Lampe exercised its rights under the Note
 12 Agreement, the Overlook Note, and the Overlook Mortgage, and initiated a non-judicial
 13 foreclosure of the Overlook Lots in accordance with Montana law.

14 In response, Blixseth hired David S. Kerruish to represent Overlook Partners in
 15 this lawsuit and, among other things, instructed Mr. Kerruish to file a Motion for
 16 Temporary Restraining Order and Preliminary Injunction to Restrain Foreclosure Sale
 17 ostensibly on behalf of Overlook Partners. See Amended Order Disqualifying Counsel of
 18 Record for Overlook Partners, filed August 24, 2012. [Dckt 17-5]. Mr. Kerruish filed that
 19 motion and obtained the TRO. See Temporary Restraining Order Restraining Foreclosure
 20 Sale and Setting Hearing, filed July 31, 2012. [Dckt 8-6]. Pursuant to the TRO, the Ex
 21 Parte Court Commissioner required Overlook Partners to post the Injunction Bond in the
 22 amount of \$25,000.00. Id. at ¶ 2. One of the express purposes of the Injunction Bond was
 23 “to ensure payment of 395 Lampe, LLC’s attorney’s fees and costs....” Id.

24 395 Lampe filed a Motion to Disqualify Counsel of Record for Overlook Partners,
 25 seeking to disqualify Mr. Kerruish as Overlook Partners’ counsel and to have all pending
 26 actions taken by Mr. Kerruish withdrawn (“Motion to Disqualify”). [Dckt 13-7]. That
 27 motion was granted by Judge Rogers in Superior Court and all actions taken by Mr.

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1 Kerruish on behalf of Overlook Partners were terminated and vacated, including the TRO.
 2 See Amended Order Disqualifying Counsel of Record for Overlook Partners, filed August
 3 24, 2012. [*Dckt* 17-5].

4 On September 5, 2012, Kawish removed this matter to this Court. On October 29,
 5 2012, the Superior Court entered an Order Directing Delivery of Bond, transferring the
 6 Injunction Bond to this Court for disposition. See Order Directing Delivery of Bond,
 7 attached as Exhibit "1." On November 21, the Order Directing Delivery of Bond was
 8 modified and Finding of Fact No. 1 of the Order Directing Delivery of Bond was vacated.
 9 See Order Granting Defendants' Motion for Partial Relief from Order Directing Delivery
 10 of Bond Pursuant to CR 60, attached as Exhibit "2." The Order Directing Delivery of
 11 Bond was modified not because it is erroneous, but because the Superior Court felt that it
 12 lacked jurisdiction to take any action related to the Injunction Bond other than transfer the
 13 Injunction Bond. Id.

14 395 Lampe incurred \$13,038.75 in attorneys' fees and costs in opposing the TRO
 15 and bringing the Motion to Disqualify. These attorneys' fees and costs were incurred
 16 directly as a result of 395 Lampe being restrained and in direct attempts to dissolve the
 17 improper restraint. Accordingly, this Court should order that \$13,038.75 be surrendered
 18 to 395 Lampe from the Injunction Bond and release the remainder to Overlook Partners.

19 **III. EVIDENCE RELIED UPON**

20 This Motion to for Partial Surrender of Injunction Bond is supported by the files
 21 and records in this matter, the attached exhibits, and the following authority.

22 **IV. ARGUMENT**

23 The TRO was issued, and the Injunction Bond posted, under Washington State
 24 law. Accordingly, this Motion should likewise be decided under Washington State law.

25 No restraining order shall issue except upon the giving of security by the
 26 application for the payment of such costs and damages as may be incurred or suffered by
 27 any party who is found to have been wrongfully restrained. CR 65(c); see also FRCP

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1 65(c). The security shall be conditioned to pay all damages and costs which may accrue
 2 by reason of the restraining order. RCW 7.40.080.

3 As a general rule, attorneys' fees are damages recoverable by the party who
 4 successfully resists a wrongful injunction. White v. Wilhelm, 34 Wash. App. 763, 774,
 5 665 P.2d 407, 413 (1983) (quoting Parsons Supply, Inc. v. Smith, 22 Wash.App. 520, 524,
 6 591 P.2d 821 (1979)). The purpose of this rule is to deter plaintiffs from seeking an
 7 unnecessary preliminary injunction or restraining order and consequently permits recovery
 8 of those fees incurred in dissolving a wrongfully issued injunction or order. Id. "The test
 9 is not whether the injunction was erroneous on its face, but whether it is later determined
 10 that the restraint was erroneous in the sense that it would not have been ordered had the
 11 court been presented all of the facts." Knappett v. Locke, 92 Wash. 2d 643, 647, 600 P.2d
 12 1257, 1259 (1979).

13 Here, the Superior Court required that Overlook Partners post a bond in the
 14 amount of \$25,000 as a condition to the continuation of the restraint of foreclosure sale.
 15 The bond was set at a value "sufficient in amount to ensure payment of 395 Lampe's
 16 attorney's fees and costs on [the TRO motion]." See TRO at ¶ 2. [*Dckt* 8-6].

17 Upon review of all of the facts, the Superior Court determined that the TRO was
 18 improper because Mr. Kerruish was improperly representing Overlook Partners when he
 19 obtained the TRO. See Amended Order Disqualifying Counsel of Record for Overlook
 20 Partners, filed August 24, 2012. [*Dckt* 17-5]. As a result, the Superior Court vacated the
 21 TRO. Id. 395 Lampe is entitled to recover its attorneys' fees and costs incurred in
 22 opposing and vacating the wrongfully issued TRO.

23 395 Lampe incurred \$13,038.75 in attorneys' fees in costs in defending the TRO
 24 and the subsequent preliminary injunction and in taking action to have the TRO vacated.
 25 See Declaration of Austin K. Sweet In Support of Motion for Partial Surrender of
 26 Injunction Bond, attached as Exhibit "3;" see also Affidavit of Jody M. McCormick
 27 Regarding Attorneys' Fees, attached as Exhibit "4." The Injunction Bond was issued to

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ensure that 395 Lampe would be able to recover these attorneys' fees and costs. Therefore, the Injunction Bond should be surrendered in the amount of \$13,038.75 and the excess should be released to Overlook Partners.

IV. CONCLUSION

Overlook Partners wrongfully sought and obtained a TRO restraining 395 Lampe from completing the non-judicial foreclosure sales of the Overlook Lots. 395 Lampe incurred \$13,038.75 in opposing the TRO and ensuring that the TRO was properly vacated. Pursuant to Washington law and the express purpose of the Injunction Bond, \$13,038.75 should be surrendered to 395 Lampe and the excess of the Injunction Bond should be released to Overlook Partners.

DATED: November 29, 2012

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